

1 HONORABLE RONALD B. LEIGHTON  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 UNITED TRANSPORTATION UNION,  
11 GENERAL COMMITTEE OF  
12 ADJUSTMENT GO-386, J.D. Fitzgerald,  
General Chairman,

13 Plaintiff,

14 v.

15 BURLINGTON NORTHERN SANTA FE  
16 RAILROAD COMPANY, a Delaware  
corporation; and LONGVIEW SWITCHING  
COMPANY, a Washington corporation,

17 Defendants.

18 Case No. C06-5441 RBL

19 ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS

20 **1. Background.**

21 This matter is before the court on the Defendants Burlington Northern's ("BNSF") and Longview  
22 Switching's ("LSC") Motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Plaintiff United  
23 Transportation Union ("UTU") complains that BNSF violated or unilaterally altered the collective bargaining  
24 agreement between it and BNSF, when it implemented an "Overhead Trackage Rights Agreement" with LSC.  
25 LSC is owned by BNSF and another non-party railroad, Union Pacific ("UP"). The Agreement transferred  
26 operational responsibilities at a Longview switching yard from BNSF, UP, and LSC in an apparently inefficient  
sharing arrangement, to LSC alone.

27 BNSF and LCS informed the Surface Transportation Board ("STB") of the Agreement and of thier  
28 position that the Agreement was exempt from the provisions of the Railway labor Act ("RLA"). The

1 Defendants argued that the Agreement should be implemented despite its impact on the collective bargaining  
2 agreement and specifically its impact on union members.

3 The STB issued an Order acknowledging the Exemption in June, 2006. It stated that as a condition  
4 of the exemption, any employees affected by the Agreement would be protected by the conditions imposed in  
5 *Norfolk & Western Ry. Co. – Trackage Rights - BN*, 354 L.C.C. 605 (1978). These protections are apparently  
6 common in such cases and are well known to the parties.

7 The Union petitioned the STB to stay the exemption, arguing in part that the STB was not authorized  
8 to rule upon the Agreement. The STB denied the stay, finding that its approval was required. It also invited  
9 UTU to file a subsequent petition to reject or revoke the notice of exemption.

10 UTU instead filed this lawsuit. UTU's complaint alleges the Defendants violated the RLA by  
11 unilaterally imposing a change in working conditions, in the form of implementing the LSC Agreement, without  
12 bargaining. They seek a Declaration that the Agreement's implementation violates the RLA, and injunctive  
13 relief precluding them from doing so.

14 Defendants argue that the case should be dismissed on two primary grounds. First, they argue the  
15 Complaint fails to state a claim under Rule 12(b)(6). They argue that the STB exemption "means that  
16 defendants are permitted to implement the Agreement without regard to any restrictions that may otherwise  
17 exist under any collective bargaining agreement."

18 Second, they argue that this court does not have subject matter jurisdiction over the dispute because  
19 in order to find for the plaintiffs, this court would necessarily have to determine that the STB's exemption was  
20 incorrect, which it cannot do. Under 28 U.S.C. §2342(5), the Circuit Court of Appeals has "exclusive  
21 jurisdiction" to hear appeals of "final orders of the STB."

22 Alternately, the Defendants argue that even if the STB's approval of the Agreement was not  
23 dispositive, this court does not have subject matter jurisdiction to reach the merits of the UTU's claims because  
24 they present a "minor dispute" which must be arbitrated pursuant to the RLA.

25 The UTU initially moves to strike all affidavits and exhibits, arguing that the court cannot consider  
26 them in ruling under Rule 12(b)(6). It argues that the "facts" regarding the transaction and the Defendants'  
27 intent in entering into it are disputed. If the court does consider the evidence, the UTU seeks to stay or  
28 continue the "converted" summary judgment motion so that it may conduct discovery.

1 Substantively, the UTU argues that it does not in fact attack the STB decision, and that BNSF's  
 2 jurisdictional argument therefore fails. Instead, it claims that it seeks to enforce BNSF's obligations under the  
 3 RLA (§2), and argues that those obligations (regarding bargaining and unilateral changes in working  
 4 conditions) are outside the STB's jurisdiction. It argues that only this court can resolve disputes over BNSF's  
 5 RLA §2 obligations.

6 The UTU also argues that the transfer of switching work from BNSF employees to LSC – which is a  
 7 BNFS subsidiary, and which UTU claims is BNSF's "alter ego" – is a sham transaction. It argues that the  
 8 transfer of switching to a "shell" company is based not on operating efficiencies but is instead anti-union. This,  
 9 it claims, is an independent basis for this court's jurisdiction under the RLA and *BNSF v. UTU*, 862 F.2d 1266  
 10 (7<sup>th</sup> Cir. 1988) ("*Winona Bridge*").

11 UTU argues, in a variety of ways, that this court (and not the STB) has jurisdiction to determine  
 12 whether any changes to the parties' CBA are necessary to implement the LCS agreement. It argues that the  
 13 consummation of the STB-approved agreement is not the same as the subsequent implementation of that  
 14 agreement; that the ICA and the RLA must be harmonized; and that the allegations of violations of RLA §2  
 15 is a major, not a minor dispute that can and must be resolved in court and not by arbitration.

16 The Defendants respond that *Winona Bridge* is no longer good law and is distinguishable, and that the  
 17 current state of the law in the Ninth Circuit is articulated in *RLEA v. Southern Pacific Railway*, 7 F.3d 902 (9<sup>th</sup>  
 18 Cir. 1993). Under that authority, they argue, the Ninth Circuit has held unambiguously that District Courts  
 19 do not have jurisdiction to hear claims regarding changes in labor agreements necessary to implement the ICC  
 20 [STB] approved transaction.

21 **2. Discussion.**

22 As an initial matter, the Defendants' primary arguments arise under Fed.R.Civ.P.12(b)(1). The court  
 23 can consider matters outside the pleadings in evaluating its jurisdiction when challenged under this rule.

24 A complaint must be dismissed under Fed.R.Civ.P.12(b)(1) if, considering the factual allegations in the  
 25 light most favorable to the plaintiff, the action: (1) does not arise under the Constitution, laws, or treaties of  
 26 the United States, or does not fall within one of the other enumerated categories of Article III, Section 2, of  
 27 the Constitution; (2) is not a case or controversy within the meaning of the Constitution; or (3) is not one  
 28 described by any jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *D.G. Rung Indus., Inc. v.*

1 *Tinnerman*, 626 F.Supp. 1062, 1063 (W.D. Wash. 1986); *see* 28 U.S.C. §§ 1331 (federal question jurisdiction)  
 2 and 1346 (United States as a defendant). A federal court is presumed to lack subject matter jurisdiction until  
 3 plaintiff establishes otherwise. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); *Stock*  
 4 *West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9<sup>th</sup> Cir. 1989). Therefore, plaintiff bears the burden  
 5 of proving the existence of subject matter jurisdiction. *Stock West*, 873 F.2d at 1225; *Thornhill Publishing*  
 6 *Co., Inc. v. Gen'l Tel & Elect. Corp.*, 594 F.2d 730, 733 (9<sup>th</sup> Cir. 1979).

7 When considering a motion to dismiss pursuant to Rule 12(b)(1), the court is not restricted to the face  
 8 of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of  
 9 jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9<sup>th</sup> Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989);  
 10 *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9<sup>th</sup> Cir. 1983). A Rule 12(b)(1) motion can attack  
 11 the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in so doing, may  
 12 rely on affidavits or any other evidence properly before the court. *St. Clair v. City of Chico*, 880 F.2d 199, 201  
 13 (9th Cir. 1989), *cert. denied*, 493 U.S. 993, 110 S.Ct. 541 (1989); *see also Land v. Dollar*, 330 U.S. 731, 735  
 14 n. 4 (1947).

15 Thus, the court will not strike the Defendants' affidavits in connection with its evaluation of the Rule  
 16 12(b)(1) motion. Furthermore, the court is not relying on the Defendants' stated "intent" in reaching and  
 17 implementing the agreement; it is relying on the facts related to the STB's approval and exemption.

18 It appears undisputed that the STB approved the BNSF/LSC agreement, and that in conjunction with  
 19 that approval it exempted BNSF from otherwise applicable RLA limitations. Relying on *Norfolk & Western*  
 20 *RR v. ATDA*, 499 U.S. 117 (1991), and subsequent cases, Defendants argue that labor disputes arising from  
 21 the agreement's implementation are exclusively within the STB's jurisdiction, and, therefore, that this court  
 22 does not have jurisdiction over them.

23 UTU responds by relying on *Winona Bridge* – a Seventh Circuit case which pre-dates *Norfolk &*  
 24 *Western* and *Southern Pacific*. *Winona Bridge* involved BNSF's transfer of 1800 miles of trackage rights  
 25 (from Wisconsin to Seattle) to a pre-existing, if largely inoperative, wholly owned subsidiary, Winona Bridge.  
 26 Prior to the transfer, Winona Bridge had five employees and its assets consisted of an out of service bridge and  
 27 1.07 miles of track. The transfer followed a nation-wide attempt to bargain, and the failure of those efforts on  
 28 the portion of BNSF track which was then transferred to Winona Bridge. *Winona Bridge* at 1269. The

1 Seventh Circuit found that the transfer was to a shell corporation for the sole purpose of avoiding bargaining  
 2 and an existing CBA, and characterized the subsequent dispute a major one under the RLA. It held that the  
 3 RLA and the ICA could be read together, and emphasized that it was the use of a shell corporation to abrogate  
 4 a collective bargaining agreement (and not the trackage rights agreement itself) that made the dispute a major  
 5 one. *Id.* at 1279.

6       *Winona Bridge* does not control for two reasons. First, it is entirely different factually. There, the  
 7 transferee was wholly owned and minute, and the subject of the transfer was BNSF's entire Northern Line.  
 8 Here, LSC (the transferee) is only 50% owned by BNSF, it is already engaged in the business of switching at  
 9 Longview, and the rights being transferred are not, as they were in *Winona Bridge*, many orders of magnitude  
 10 beyond what the transferee had prior to the transaction. The transfer in this case is not one to a shell or alter  
 11 ego corporation. Thus, the patently frivolous nature of the carrier's claim of contractual justification in  
 12 *Winona Bridge* are not present here. The dispute is therefore a minor one<sup>1</sup>, even under *Winona Bridge*.

13       Secondly, the law has changed since the decision in *Winona Bridge*. Subsequent cases with facts more  
 14 akin to those in this case have established that labor disputes arising from the implementation of an STB-  
 15 approved transfer agreement are within the STB's exclusive jurisdiction. See *Southern Pacific* at 906:

16       We are persuaded that because the ICC had exclusive authority to approve the  
 17 Rio Grande merger and thereby exempt the Railroads from any procedural or  
 18 substantive law which might otherwise impede that merger, it should have  
 19 *exclusive authority* to clarify the scope of its own approval and the  
 20 corresponding breadth of the exemption. Such orders would, of course, be  
 21 subject to appellate review in the circuit court of appeals, under with the  
 22 appropriate standard of deference to the agency decision. A contrary result  
 23 would interfere with the *exclusive authority* that the statutory scheme confers  
 24 upon the ICC in this area.

25       (Emphasis added). Other Circuits have, as the Defendants point out, arrived at the same conclusion. See, for  
 26 example, *Norfolk & W. Ry. Co. V. BRRS*, 164 F.3d 847 (4<sup>th</sup> Cir. 1998).

27       Thus, it is apparent that the labor dispute arising from the implementation of the agreement is subject  
 28 to the STB's exclusive jurisdiction. Plaintiff's attempt to characterize the dispute as one going to the heart of  
 the RLA does not change the analysis. As the Defendants point out, it would make no sense for the law to  
 grant the STB exclusive jurisdiction to exempt the carrier from the RLA and therefore permit departure from

<sup>1</sup>Because the court determines that it does not have jurisdiction to hear UTU's complaints about the implementation of the agreement, it does not reach the "major/minor dispute" issue, and does not rule on the Rule 12(b)(6) aspect of Defendants' Motion.

1 the CBA, only to then allow the union to nevertheless preclude the agreement's implementation by arguing in  
2 court that the RLA applies and that the carrier is has unilaterally changed working conditions while refusing  
3 to bargain. Such a result would also make the STB's "exclusive authority" meaningless.

4 For these reasons, the court agrees that the dispute and violations alleged in Plaintiff's complaint is  
5 within the STB's exclusive jurisdiction, and this court does not have jurisdiction over them. Defendants' Rule  
6 12(b)(1) Motion [Dkt.#12] is therefore GRANTED and this matter is DISMISSED.

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8 DATED this 2<sup>nd</sup> day of January, 2007.

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RONALD B. LEIGHTON  
UNITED STATES DISTRICT JUDGE

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